IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN WRIGHT	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	NO. 01-2655

MEMORANDUM

Giles, C.J. September _____, 2001

Nathan Wright filed this action on May 30, 2001, against Philadelphia Gas Works ("PGW"), seeking compensatory and punitive damages, as well as employment reinstatement, attorney's fees, and costs, for violation of Title VII, 42 U.S.C. § 2000e et seq. (Count I), the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Count II), and the Philadelphia Fair Practices Ordinance, as amended, Philadelphia Code, ch. 9, §§ 1100-1110 et seq (Count III).

Now before the court is Defendant's Motion to Strike Portions of Complaint or in the Alternative to Dismiss Specific Allegations and/or Counts, pursuant to Federal Rules of Civil Procedure 12(f) and 12(b)(6), on the following grounds: 1. Plaintiff's complaint improperly attempts to invoke the jurisdiction of this court under 42 U.S.C. § 1367, when in fact no such statute exists; 2. Plaintiff has failed to exhaust his administrative remedies with respect to averments contained in Plaintiff's complaint in paragraphs 13, 14, 18, 19, 21, and 27; and 3. Plaintiff's complaint improperly seeks the imposition of punitive damages under civil rights

legislation against a local government agency, where Defendant, a wholly-owned municipal entity, is not subject to the imposition of punitive damages. Defendant's motion is denied in part, to the extent that the court recognizes that "42 U.S.C. § 1367" is a typographical error and thus reads the plaintiff's invocation of supplemental jurisdiction as appropriately pled under 28 U.S.C. § 1367. For the reasons that follow, the remainder of Defendant's motion is granted, in part, and denied, in part.

I. FACTUAL BACKGROUND

Wright was hired to work for PGW in August 1984, as a telephone representative in the PGW Credit Collection Department. On January 11, 2000, PGW suspended Wright's employment for approximately 20 days, allegedly for making personal telephone calls at his work station and/or rolling customers' calls. Upon his return to work on February 8, 2000, Wright was required to sign a "Last Chance Agreement" ("LCA") in order to continue his employment.

Wright alleges, but does not specify, that white co-workers were not similarly suspended or required to sign an LCA to continue employment for conduct which was more egregious than that of which plaintiff was accused. He further alleges that he and other black employees were subjected to a hostile environment on account of their race, which included being subjected to racially derogatory terms- e.g., a supervisor named Hans on one occasion referred to plaintiff as a "boy." Wright complained to the Director of Collections, Paul Donahue, about Hans' conduct. The complaint does not specify as to whether Donahue took any positive action on the report of alleged misconduct, but avers that on May 8, 2000, PGW

terminated Wright's employment. According to PGW, the termination was in response to customer complaints and/or allegations that he was rude and abusive to customers. The complaint avers that the termination was in retaliation for Wright's complaints about his supervisor's derogatory comment. (Compl. ¶ 18.)

Wright further avers that PGW received customer complaints about white employees, including customer complaints that the employees used racially derogatory terms, and did not terminate those white employees.

On November 6, 2000, Wright filed a Charge of Race Discrimination with the Equal Employment Opportunity Commission ("EEOC"), which charge, as is that agency's practice, it filed jointly with the Pennsylvania Human Rights Commission ("PHRC") and the Philadelphia Commission on Human Relations ("Commission"). In the EEOC charge, Wright alleged that on January 10, 2000, he was suspended for 20 days for making three or four personal telephone calls while at his workstation, and for allegedly "rolling" customers' calls, both work rule violations, and was required to sign an LCA upon his return to work. He further alleged that, on May 8, 2000, he was called into Human Resources and told that complaints had been received about his work performance on May 4 and 5, and was terminated on that day. Wright asserted that his discharge was racially motivated, in violation of Title VII and the Pennsylvania Human Relations Act ("PHRA" or "Act"), 43 Pa. C.S.A. § 951 et seq., because white employees, Daniel Keogh and Kevin Danhardt, who had more work infractions than he, and who had also violated their LCA's, were not terminated from PGW. The EEOC charge did not include any other allegations. On March 6, 2001, the EEOC issued a Notice of Right to Sue letter.

The instant complaint alleges racially motivated discharge, hostile work

environment, and retaliation, in violation of Title VII, 42 U.S.C. § 1981, and the Philadelphia Fair Practices Ordinance ("PFPO"), as amended, Philadelphia Code, ch. 9, §§ 1100-1110 et seq. The latter two allegations were not referenced in his EEOC charge.

II. DISCUSSION

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate only if, accepting the well-pled allegations of the complaint as true, and drawing all reasonable inferences in the light most favorable to plaintiff, it appears that a plaintiff could prove no set of facts that would entitle it to relief. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Weiner v. Quaker Oats Co., 129 F.3d 310 (3d Cir. 1997); Unger v. National Residence Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1990).

Motions to strike matters from pleadings, pursuant to Federal Rule of Civil Procedure12(f), are disfavored by the courts and should not be granted, even in cases where averments complained of are literally within provisions of federal rule providing for striking of redundant, immaterial, impertinent or scandalous matter, in absence of demonstration that allegations attacked have no possible relation to controversy and may prejudice other party. United States v. $200,226.00 in U.S. Currency, 864 F. Supp. 1414 (D.P.R. 1994), vacated on other grounds, 57 F.3d 1061 (1st Cir. 1995); see also Tonka Corp. v. Rose Art Industries, Inc., 836 F. Supp. 200 (D.N.J. 1993). Because none of plaintiff's allegations, as pled, is redundant, immaterial, impertinent, or scandalous, or unrelated to the controversy alleged, defendant's motion to strike pursuant to Rule 12(f) is denied.

The court now considers defendant's remaining arguments in support of the alternative motion to dismiss pursuant to Rule 12(b)(6).

A. Exhaustion of Administrative Remedies

1. Title VII

PGW argues that, although a single charge of discrimination was filed with the EEOC, which also became filed with the PHRC on plaintiff's behalf, it alleged only racially motivated discharge and did not allege hostile work environment or retaliation. Thus, PGW urges that those allegations must be dismissed for failure to exhaust administrative remedies. It is well settled that as a pre-condition to filing suit under Title VII, a plaintiff must first file charges with the EEOC within 180 days of the alleged discriminatory act. 29 U.S.C. § 626(d); 28 U.S.C. § 2000E-5(e); Charles v. Hess Oil Virgin Islands Corp., 24 F. Supp.2d 484, 486 (D.V.I.) (citing Robinson v. Dalton, 10 F.3d 1018, 1020-21 (3d Cir. 1997). Since the EEOC charge is devoid of all claims except racially motivated discharge, the Title VII claims of hostile work environment and retaliation are dismissed with prejudice.

2. PFPO

Similarly, a pre-condition to filing a lawsuit under the PHRA is the filing of a charge of discrimination with the PHRC or one of its local counterparts. 43 Pa. Cons. Stat. Ann. §§ 959(h), 962(c); Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir. 1997); Vincent v. Fuller, 616 A.2d 969, 974 (Pa. 1992). Although Wright did not state a cause of action under the PHRA, but rather under the PFPO, defendant argues that this too requires exhaustion of administrative remedies.

The PHRA established the PHRC, which has the power and duty, inter alia, "[t]o

initiate, receive, investigate, and pass upon complaints charging unlawful discriminatory practices." 43 Pa. Cons. Stat. Ann. § 957(f). In addition, the Act authorizes local governments to establish human relations commissions with powers and duties similar to those exercised by the PHRC. 43 Pa. Cons. Stat. Ann. § 962.1(d). Under this authority, Philadelphia County established the Philadelphia Commission on Human Relations ("Commission") to administer and enforce all statutes and ordinances prohibiting discrimination. The Commission is thus empowered to enforce Chapter 9-1100 of the PFPO, which, like the PHRA, prohibits employment discrimination based on race.

The PFPO outlines procedures for filing complaints of unlawful employment practices with the Philadelphia Commission, Philadelphia Code § 9-1107(1), similar to those required for filing complaints with the PHRC, 43 Pa. Cons. Stat. Ann. § 959; however, section 9-1110 of the Philadelphia Code states that "notwithstanding . . . [these] provisions . . . any person aggrieved by a violation of this ordinance shall have a right of action in a court of competent jurisdiction and may recover for each violation. . . ." Plaintiff argues that since the PFPO provides for this private right of action in court, and because the PHRA "becomes the exclusive remedy and is preemptive only when its procedures are invoked. . . . Since Plaintiff has not invoked the procedures of the PHRA against Defendant, he may pursue his PFPO claim directly in court." (Pl. Resp. at 4-5.)

This court's review of Pennsylvania law reveals no Supreme Court precedent on the issue of whether an aggrieved party under the PFPO must first exhaust his administrative remedies before proceeding to court. In order to predict how the Supreme Court of Pennsylvania would resolve this question of unsettled state law, the court should consider "relevant state

precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." Markel v. McIndoe, 59 F.3d 463, 473 n.11 (3d Cir. 1995).

The Pennsylvania Supreme Court has stated that the Pennsylvania General Assembly, recognizing the "invidiousness and the pervasiveness of the practice of discrimination," enacted the PHRA in order to "create a procedure and an agency specially designed and equipped to attack this persisting problem and to provide relief to citizens who have been unjustly injured thereby." Fye v. Central Transportation, Inc., 487 Pa. 137, 140 (Pa. 1979). The court also stated, however, that this provision did not necessarily vitiate other remedies in lieu of the PHRA procedure:

> Although attempting to fashion a special remedy to meet this illusive and deceptive evil, the General Assembly did not withdraw the other remedies that might be available depending upon the nature of the injury sustained. The legislature recognizing that the effectiveness of the procedure it had created would be enhanced by the exclusivity of the provisions of the Act, and the undesirability of allowing the person aggrieved to commence several different actions for relief, Daly v. School Dist. Of Darby Tp., 434 Pa. 286, 252 A.2d 638 (1969), provided an election for the complaining person to opt out for relief under the provisions of PHRA or the right to seek redress by other remedies that might be available.

Id. at 140-41.

In Clay v. Advanced Computer Applications, Inc., 522 Pa. 86, 94-95 (Pa. 1989), the Pennsylvania Supreme Court clarified "[its] reference to an aggrieved party's right to pursue 'other remedies that might be available.'" The court noted that "the 'other remedies' to which we referred were essentially those existing under 'provisions of any ... municipal ordinance, municipal charter or of any law of this Commonwealth relating to discrimination..., inasmuch as

these were expressly saved by the PHRA from being repealed or superseded." Id. at 95 (quoting 43 P.S. § 962(b)).

Plaintiff argues that his claim under the PFPO, a municipal ordinance, is the type of claim understood in Clay to be "expressly saved by the PHRA from being repealed or superceded," id., unlike that of the claim in Clay, a common law wrongful discharge claim that the court ultimately dismissed on the grounds of failure to exhaust administrative remedies. (Pl. Resp. at 5.) Plaintiff submits that the PFPO, which is not pre-empted by the PHRA,[1] is patterned like the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("NJLAD"), which gives an individual the right to file with an administrative agency or pursue his private action for discrimination directly in Court. N.J.S.A. § 10:5-13. (Pl. Resp. at 6.)

Although this question reflects unsettled law in Pennsylvania, Clay itself calls the plaintiff's argument into doubt, as it reaffirms the purpose of the PHRA, in part, as to create a standardized remedy under Pennsylvania law:

> In [Commonwealth, Pennsylvania Human Relations Commission v. Feeser, 469 Pa. 173, 179 (Pa. 1976)], the inadvisability of having courts of common pleas decide discrimination cases was expressly noted, and this Court rejected an interpretation of the PHRA that would have allowed a scheme whereby the "court of common pleas, which has no experience handling PHRA complaints, would resolve the dispute, while PHRC, the agency created for this purpose by the Legislature, would be denied an opportunity to hear and decide the case." We stressed that the "expertise" which the PHRC has and the courts of common pleas do not have in this area motivated the legislature to limit aggrieved

[1]"Except as provided in subsection (c), nothing contained in this act shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of this Commonwealth relating to discrimination. . . ." 43 P.S. § 962(b).

> parties from seeking remedies in the courts. . . . Thus, the statutory scheme would be frustrated if aggrieved employees were permitted to circumvent the PHRC by simply filing claims in court. This would result in the very sort of burdensome, inefficient, time consuming, and expensive litigation that the PHRC was designed to avert, and would substantially undermine the proper role of the PHRC.

Clay, 522 Pa. 919-20 (internal citations omitted). The court went on to address the apparent inconsistency that the PHRA does not pre-empt municipal remedies:

> Although the legislature chose not to foreclose an aggrieved party from electing these other possible remedies, there is no basis for belief that there was intended to be broad and unrestricted access to civil actions, outside of the PHRA, alleging discriminatory termination of at-will employment. The intended forum for addressing grievances of this sort presented in this case is the PHRC.

Clay, 522 Pa. at 95.

This court notes that other courts in the Eastern District have interpreted Clay to mean that Pennsylvania law requires exhaustion of administrative remedies before stating a claim under the PFPO . In Richards v. Foulke Associates, Inc., 151 F. Supp.2d 610 (E.D. Pa. July 9, 2001), Judge O'Neill refused to allow a PFPO claim to proceed where the plaintiff had withdrawn her administrative charge with the Commission. "The PFPO and the PHRA, and therefore the PHRC and the Philadelphia Commission, were designed to address the common problem of unlawful discrimination in Pennsylvania. I do not believe the Pennsylvania Supreme Court would interpret the PFPO to allow Philadelphia employees to circumvent the PHRA and proceed directly to court without first exhausting their administrative remedies, through either the Philadelphia Commission or the PHRC; therefore, plaintiff's claims pursuant to the PFPO will be dismissed." Id. at 616. See also Hall v. Resources for Human Devvelopment, Inc., 2000 WL

288245 (E.D. Pa. 2000) (Kauffman, J.). This court agrees with the court's analysis in Richards and, accordingly, in the instant case, plaintiff's PFPO claims for hostile work environment and retaliation are dismissed with prejudice.

3. Section 1981

All three of plaintiff's claims, as pled under 42 U.S. C. § 1981, stand, as that statute does not require exhaustion of administrative remedies. See Swicker v. William Armstrong & Sons, Inc., 484 F. Supp. 762, 769-70 (E.D. Pa.1980) (exhaustion of Title VII administrative remedies is not a jurisdictional prerequisite to a federal district court suit charging discrimination in violation of Section 1981).

B. Punitive Damages

Defendant argues that, because the City of Philadelphia, through the Department of Public Property and the Gas Commission, owns and retains responsibility for operation of PGW's facilities for the production and transmission of gas, and has the authority for setting gas utility rates, PGW is a municipal agency under Title VII and Section 1981, and thus is synonymous with the City of Philadelphia for purposes of litigating federal civil rights claims. McLaughlin v. Ross Tree Media School District, 1 F. Supp.2d 476, 483 (E.D. Pa. 1998); Hendrickson v. PGW, 672 F. Supp. 823, 825 (E.D. Pa. 1987). The court agrees, and plaintiff's claims for punitive damages are dismissed with prejudice.

III. CONCLUSION

For the foregoing reasons, defendant's Motion to Strike Portions of Complaint or in the Alternative to Dismiss Specific Allegations and/or Counts is granted, in part, and denied, in part.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN WRIGHT	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
PHILADELPHIA GAS WORKS	:	NO. 01-2655

ORDER

And now, this ____ day of September 2001, it is hereby ORDERED that PGW's Motion to Strike Portions of Complaint or in the Alternative to Dismiss Specific Allegations and/or Counts is DENIED as to (1) improper statement of jurisdiction, and (2) Motion to Strike pursuant to Federal Rule of Civil Procedure 12(f). PGW's Motion is GRANTED as to dismissal of (1) Wright's claims of hostile work environment and retaliation under Title VII and the PFPO, and (2) Wright's claims for punitive damages.

BY THE COURT:

_____

JAMES T. GILES C.J.

copies by FAX on
to